No. 3832

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN D. SPRECKELS, as special administrator of the estate of John D. Spreckels, Jr., deceased,

Plaintiff in Error,

vs.

EDITH H. WAKEFIELD,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

SAMUEL M. SHORTRIDGE,
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Counsel for Plaintiff in Error.

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This writ of error presents but a single question of law; namely, whether or not the agreement upon which the present action is based, is contrary to public policy and void.

Statement of Facts.

On December 1, 1913, John D. Spreckels, Jr., and the defendant in error herein, who were then husband and wife, entered into an agreement wherein the promises and covenants on the part of Mr. Spreckels to do certain things and to make certain

payments of money to the defendant in error, were contingent upon her procuring a divorce. This agreement contains, among other things, the following clauses:

> "That whereas, *the party of the second part is about to commence a suit for divorce against the party of the first part* and has employed Mr. Joseph T. O'Connor as her counsel for that purpose, and the party of the first part has employed Mr. Samuel M. Shortridge to represent him in the said suit; and,
>
> * * * * * * *
>
> 1. That *upon the due making and entry of an interlocutory decree of divorce* in favor of the said second party the said first party will pay unto the said second party the sum of three hundred and fifty ($350.00) dollars, monthly, in advance, commencing with the date of the entry of said interlocutory decree, for the period of one year thereafter; that upon the *due making and entry of a final decree of divorce* in favor of the said second party, said first party will pay unto the said second party, monthly, in advance, the sum of three hundred and fifty ($350.) dollars during the remaining period of her natural life. (Italics ours.)
>
> 2. That the said second party agrees to accept said several sums of three hundred and fifty ($350) dollars, monthly, in advance, as and for and in full of her right or claim to *temporary and permanent alimony, maintenance and support from the said first party.*" (Italics ours.)
>
> (Tr. p. 3.)

The present action is brought by the defendant in error to recover deferred payments amounting to $10,300 which she alleges is due her under the above provisions of the agreement in question.

Immediately following the making of this agreement; to-wit, on December 5, 1913, the defendant in error commenced an action for divorce in the Superior Court of the State of California, in and for the City and County of San Francisco, in which she charged her husband with extreme cruelty; the charges in this respect, however, being very general.

On December 17, 1913, an answer was filed denying the material allegations of the complaint; and, subsequently, on August 22, 1914, an interlocutory decree of divorce was rendered.

On August 25, 1915, a final decree of divorce was entered. Since the making of this decree the defendant in error remarried.

Argument.

ANY AGREEMENT CONDITIONED UPON THE OBTAINMENT OF A DIVORCE, OR INTENDED OR CALCULATED TO FACILITATE ITS ENFORCEMENT, IS VOID.

It will be observed that the obligation upon the part of Mr. Spreckels to pay the monthly installments, is made wholly dependent upon the granting of a decree of divorce. The agreement contains a further clause that its provisions "shall not be modified or abrogated by any interlocutory decree or final decree of divorce in favor of the said second party which may be hereafter made and entered" (Tr. p. 6).

It therefore appears that the purpose of the agreement was to control the dissolution of the marriage and the terms of dissolution as to all matters involved, including alimony, without regard to the tribunal before which the case should be heard.

The finding of the District Court to the effect that the purpose of the contract was not to bring about a dissolution of the marriage relation, or to put an end to the marriage relation, or to facilitate procuring a divorce, and that such contract did not influence or tend to influence the plaintiff in procuring a divorce, and was not so intended (Tr. p. 32) is clearly against the intent of the plain and unambiguous terms of the agreement. It is our contention that the agreement itself is against public policy, and that the intention of the parties can only be ascertained from the terms of the instrument itself, and if this instrument is to be judged in the light of the well-settled law of the land, it follows as a conclusion of law that it is void as against public policy and good morals.

In the case of Newman v. Freitas, 129 Cal. 289, the Supreme Court of California, said:

> "But there is an objection to the enforcement of the contract more radical than the one just considered. The contract is, in its nature, against the policy of the law and contrary to good morals. The law does not favor divorce, and permits it only for approved causes and on sentence from duly established public authority. Therefore, any agreement for divorce, *or any collateral bargaining promotive of it,* is consid-

ered unlawful and void. (2 Bishop on Marriage, Divorce and Separation, sec. 696; Greenwood on Public Policy, 490.) Under our code either husband or wife may enter into any agreement or transaction with the other, or with any other person, respecting property, which either might if unmarried. (Civ. Code, sec. 158.) Notwithstanding this freedom to enter into any contract between themselves or with other persons, it has been held in this state repeatedly that an agreement between husband and wife founded upon consideration to withdraw or abandon a defense to a suit for divorce, or do anything to facilitate procuring the same, is illegal and void. (Beard v. Beard, 65 Cal. 354; Senter v. Senter, 70 Cal. 619; Loveren v. Loveren, 106 Cal. 509.) In the latter case the following from Phillips v. Thorp, 10 Or. 494, is quoted with approval: 'The authorities are uniform in holding that any contract between the parties having for its object the dissolution of the marriage contract, or facilitating that result, such as an agreement by the defendant in a pending action for divorce to withdraw his or her opposition, to make no defense, is void as *contra bonos mores'*. The courts of other states have expressed themselves similarly in reference to such contracts. In Hamilton v. Hamilton, 89 Ill. 349, it is said: 'The majority of the court, however, are of the opinion that the contract set out in the declaration is in its essence and character against public policy and it must be held invalid upon that ground. While divorces are authorized by law, they ought not to be encouraged. In this contract *there is no express agreement that the husband would not resist the application for a divorce, or that he would consent to a divorce,* still it is thought that to permit such a contract as this to be enforced in the courts would *open the door for the attainment of divorces by collusion,* and upon

this ground the decision of the court in sustaining the demurrer to the declaration ought to be sustained'.

In *Muckenburg v. Holler,* 29 Ind. 139, the court say: 'The special contract for the payment of two hundred dollars was contrary to the policy of the law. It was so framed as to have effect *only on condition that a divorce should be granted. Its direct tendency was to influence the present plaintiff in procuring a divorce or in overcoming resistance to an effort by his wife directed to that end.* The marriage relation is not thus to be tampered with, and the courts, by contracts of the parties, converted into mere registers of their agreement for separation from the bonds of matrimony. The law favors marriage, and cannot, therefore, sanction contracts intended to promote its dissolution by lending itself to their enforcements. We know of no case in the books in which such an appeal to any court to compel the fulfillment of such a contract or to award damages for its breach has been successfully made'.

In *Schmieding v. Doellner,* 10 Mo. App. 373, it is said: 'That any agreement entered into between husband and wife pending a suit for divorce, or in contemplation of such a suit, whose force and effect are in any way *made dependent upon the result of the suit,* will be held void because of the motive or inducement which it offers for either a passive consent or active aid in promoting the consummation of a divorce. *There may be no direct evidence of collusion for that specific purpose. It is sufficient to vitiate the agreement if it be so framed that in order to an enjoyment of its benefits by one party or the other a decree must supervene.*"

In Loveren v. Loveren, 106 Cal. 510, the court said:

> "The instrument in question was clearly against public policy and void. (Beard v. Beard, 65 Cal. 354; 2 Bishop on Marriage and Divorce, 702, 885; Greenwood on Public Policy, 490, 491.) In *Phillips v. Thorp,* 10 Or. 494, the subject is fully considered and many authorities cited; and the courts say, quoting from another case, that 'The authorities are uniform in holding that any contract between the parties having for its object the dissolution of the marriage contract, or *facilitating that result,* such as an agreement by the defendant in a pending action for divorce to withdraw his or her opposition and to make no defense, is void as contra bonos mores; and that courts will esteem it their duty to interfere, *upon their own motion,* whenever it appears the dissolution is sought to be effected by the connivance or collusion of the parties.'
>
> Appellant contends that the court had no jurisdiction in this action to set aside the said written instrument, and that an independent action should have been brought for that purpose. But the court clearly had jurisdiction to make disposition of the community property (Civ. Code, secs. 146, 147); and, when appellant insisted upon said instrument as providing how said property should be divided, the court necessarily had jurisdiction to consider it, and to disregard it if found to be void. Indeed, appellant asked for findings upon the subject of said instrument, thus acknowledging the jurisdiction. Whenever a void contract is relied on, *no matter what the form of the action is in which it is presented, a court will disregard it.* Speck v. Dansmann, 7 Mo. App. 165 (quoted in Greenwood on Public Policy, 490, 491), the court say: 'Such pretended agreements, if they are to have any force, *must be subjected to the examination*

> *of the divorce court,* and derive their sanction *from a decree made by the court* with a knowledge of the facts.' "

In Beard v. Beard, 65 Cal. 356, in speaking of a similar transaction, the court decided that the plaintiff must content herself with so much of the benefit of the void contract as she had already secured unchallenged.

In Birch v. Anthony, 77 Am. St. Reports 380 (Ga.), the court said:

> "Whatever else may have been contemplated by the parties to this contract, *it manifestly appears that it was their intention to promote a dissolution of the marriage relation existing between them.* By reference to the contract, it will be seen that it was apparently complete and ready to be signed when the condition was added providing, in effect, that it should be legal if a divorce should be granted to the husband on or before a fixed date. *This provision renders the whole contract illegal, as it is well settled that a contract intended to promote a dissolution of marriage is contrary to the policy of the law, illegal and void:* 2 Am. & Eng. Ency. of Law, 2d ed., 127; 9 Am. & Eng. Ency. of Law, 1st ed., 920; 1 Bishop on Marriage and Divorce, sec. 76; 2 Bishop on Marriage and Divorce, sec. 696; Adams v. Adams, 25 Minn. 72; Weeks v. Hill, 38 N. H. 199; Everhart v. Puckett, 73 Ind. 409; Sayles v. Sayles, 21 N. H. 312; Goodwin v. Goodwin, 4 Day, 343; Cross v. Cross, 58 N. H. 373; Muckenburg v. Holler, 29 Ind. 139; 92 Am. Dec. 345; Hamilton v. Hamilton, 89 Ill. 349; Phillips v. Thorp, 10 Or. 494. In Sayles v. Sayles, 21 N. H. 312, 53 Am. Dec. 208, Wood, J., said: 'The object of the agreement was to bring about a dissolution of the marriage contract, and

to put an end to the various duties and relations resulting from it. *Any contract having such purpose, object and tendency, cannot be, in law, sustained, but must be regarded as being against sound public policy, and consequently illegal and void.'* " (Italics ours.)

To the same effect are the following cases:

Teachout v. Bogy, 175 Cal. 484;
Sayles v. Sayles, 21 N. H. 312;
Barngrove v. Pettigrew, 128 Iowa 523;
Davis v. Hinman, 103 N. W. 668;
Muckenburg v. Holler, 29 Ind. 139;
Kissler v. Kissler, 141 Wis. 491;
Delbridge v. Beach, 66 Wash. 416;
McDonald v. McDonald, 125 Mo. App. 513;
Adams v. Adams, 25 Minn. 77;
Emerson v. Emerson, 120 Md. 584.

The last word of the California courts upon this subject is to be found in the case of McCahan v. McCahan, 31 Cal. App. Dec. 1106 (advance sheet, April 20, 1920), in which the District Court of Appeal said:

"In the event that any action for divorce shall ever be instituted between the parties hereto, then and in such event it is agreed that there shall be awarded to the party of the second part the sum of one hundred dollars in full settlement of all her claims for counsel fees and costs herein; and it is further agreed that said sum shall be awarded in one action only.

Under our code either husband or wife may enter into any agreement or transaction with the other respecting property which either might if unmarried. (Civ. Code, sec. 158.) Notwith-

> standing this freedom to so contract, it has been repeatedly held in this state that an agreement between husband and wife to do anything to facilitate procuring a divorce is illegal and void. (Newman v. Freitas, 129 Cal. 283.) (1) We think it requires no lengthy discussion to point out the circumstances under which an agreement in advance and in anticipation of a divorce action being brought, to pay the counsel fees and costs, may operate to facilitate a dissolution of the marriage tie. Such being its effect it is void as contra bonos mores. (Pereira v. Pereira, 156 Cal. 1, 5.)"

In Johnson v. Johnson, 233 Fed. 761 (9th Circuit), the court said:

> "It was decided April 6, 1914: First, that the agreement entered into between Mr. and Mrs. Johnson immediately prior to the divorce, in which he promised to pay her $3000, and also $75 a month additional, pending the payment of the principal sum, was null and void, because it was made in contemplation of and to facilitate the divorce."

These cases distinctly decide that although there may be *no direct evidence of collusion* for the purpose of obtaining a divorce, it is sufficient to vitiate the agreement *if it be so drawn, in order to an enjoyment of its benefits by one party or the other a decree must supervene.* And while in the case at bar there is no express agreement that the husband would not resist the application for a divorce, or that he would consent to a divorce, still the payments are made *dependent* upon the *"due making and entry of an interlocutory decree of divorce",* and

upon the "*due making and entry of a final decree of divorce.*" (Subd. 1 of the contract.)

In Neddo v. Neddo, 44 Pac. 2, the Supreme Court of Kansas, speaking through its Chief Justice, said:

> "A contract which incites, by the hope of financial profit, the separation of married people, should not be enforced."

As has been so frequently pointed out by the courts, there are three parties to every action for a divorce. Although upon its face a controversy between the parties of record only, it is in fact a triangular suit *sui generis,* the government occupying the position of a third party without counsel, it being the duty of the court to protect its interests (14 Cyc. 577). Hence, any agreement between husband and wife based upon a promise or understanding to institute an action to dissolve the marriage relation, would be against public policy and void.

The answer in the case at bar denies that the agreement set forth has been or now is in full force and effect (lines 2 and 3, amended answer, page 2). A void agreement is at no time in full force or effect, and

> "courts will esteem it their duty to interfere *upon their own motion,* whenever it appears that dissolution is sought to be effected by the connivance or collusion of the parties. * * * Whenever a void contract is relied on, no matter what the form of the motion in which it is presented, the court will disregard it".
>
> Loveren v. Loveren, 106 Cal. 510.

We submit that no decision of the California courts can be found to controvert the rules of law laid down in the foregoing cases; and, of course, the California law would be controlling in the present case. Under the authorities the agreement of December 1, 1913, was wholly void as being against public policy, for the reason that it was contingent upon and in aid of obtaining a divorce, and was only to be effective in the event the defendant in error should obtain a divorce. (Pereira v. Pereira, 156 Cal. 1; Newman v. Freitas, 129 Cal. 289.)

The only provision for alimony is found in the interlocutory decree of divorce, which does not in any way refer to the agreement in question, nor is it based thereon. This decree contains the following clause:

> "It is further ordered, adjudged and decreed that the custody of the children of plaintiff and defendant, to-wit: Marie Spreckels, Adolph Spreckels and John D. Spreckels, III, be and the same is hereby awarded to plaintiff. That the defendant pay to plaintiff for her support during her life the sum of ten (10) dollars per month; that defendant pay to plaintiff for the maintenance of each of said children the sum of one hundred (100) dollars per month during the minority of said children and pay to plaintiff as attorney's fees herein the sum of fifteen hundred dollars."

The present action is not brought upon this decree, but upon the original agreement between the parties, which we contend, is merged into the decree.

A CONTRACT FOR ALIMONY IS MERGED INTO AND SUPERSEDED BY THE SUBSEQUENT INTERLOCUTORY DECREE OF DIVORCE CONTAINING A PROVISION FOR ALIMONY.

Barnett v. Barnett, 50 Pac. 340;
Walker v. Walker, 50 N. E. 68 (Ind.);
Patton v. Loughbridge, 49 Ia. 218;
Barnes v. Barnes, 76 S. E. 52 (Ga.);
Schultz v. Christopher, 118 Pac. 630 (Wash.);
Ras. v. Ras, 35 Pac. 806 (Kan.).

In Olsen v. Superior Court, 165 Pac. 707, the court said:

> "Under our divorce laws the interlocutory decree fixes the right of the blameless spouse to a decree of divorce as and of the time when the interlocutory decree itself is given. Barring the familiar equitable considerations of fraud or mistake in the procurement of this decree, all matters therein litigated have passed beyond the possibility of future litigation."

Such an agreement as the one in question, if it is to have any effect or force whatever, must be subjected to *the examination of the divorce court,* and derive its sanction *from a decree of that court* with full knowledge of all the facts.

Loveren v. Loveren, 106 Cal. 513;
Daggett v. Daggett, 5 Paige 509;
France v. France, 79 App. Div. 291; N. Y. Supp. 579.

In such a case the divorce court may use its own discretion with respect of the agreement. It may ignore it altogether; or it may grant even greater alimony than is therein provided; or, it may, if it

deem the agreement unfair, or collusive, set it aside entirely and exercise its own discretion as to a proper sum to require a husband to pay a wife (Wallace v. Wallace, 67 At. 582).

THE INTERLOCUTORY DECREE ALONE, AND NOT THE FINAL DECREE, FIXES THE QUESTION OF ALIMONY, AND BY THE FINAL DECREE NO NEW ISSUES CAN BE PRESENTED, OR NEW PROPERTY RIGHTS ACQUIRED.

In the present case the court did not in its final decree, alter the agreement or base any judgment thereon. It simply referred to it incidentally. Concededly, it was not before the court as a part of the trial, for, as pointed out, the interlocutory decree is not based thereon, and the final decree could not alter or change the award in the interlocutory decree, nor does it attempt to do so.

In the case of Reed v. Reed, 9 Cal. App. 753, the court said:

> "In *John v. Superior Court,* 5 Cal. App. 262, the same views are in effect expressed in regard to the interlocutory decree. There the court said: 'Section 132 gives the court the power of its own motion to enter a final judgment at the expiration of one year from the entry of the interlocutory judgment; and the fact that this authority is given the court would seem to exclude the idea that a trial was contemplated at the time of entering the last judgment. * * * The decision of the court, both as to the granting of the divorce and the disposition of the property, is subject to review on appeal; and certainly it was never intended that there should be a delay

of a year, and possibly of a longer period, in case of an appeal from the interlocutory judgment, and then another trial as to issues involving the property rights of the parties, followed by the delay of another appeal from the decision thereon and judgment disposing of the same.' (See, also, *Barron v. Barron* (Cal.), 96 Pac. 273; *Grannis v. Superior Court,* 146 Cal. 245; *Claudius v. Melvin,* 146 Cal. 257.) The court said in the latter case: 'The judgment entered on September 4, 1903, therefore, constituted a valid interlocutory judgment, declaring the plaintiff entitled to a divorce. As such it was subject to be vacated on appeal or on motion for a new trial, or by proceedings under section 473 of the Code of Civil Procedure. The time for all these proceedings having expired, and no such proceeding to vacate it having been instituted, the court thereupon lost all power *by any proceeding in the case to modify or vacate the judgment so far as it constituted an interlocutory judgment.*' "

In Bancroft v. Bancroft, 178 Cal. 368, the Supreme Court said:

"It is well settled that an interlocutory decree of divorce is only subject to attack in the proceedings in which it is entered upon appeal, or by proceedings under section 473 of the Code of Civil Procedure, within six months after the entry of such decree, and that after the expiration of the period within which either of these forms of attack may be made, the trial court is without jurisdiction to *alter or set aside its interlocutory decree.* (Claudius v. Melvin, 146 Cal. 257; Suttman v. Superior Court, 174 Cal. 243; Newell v. Superior Court, 27 Cal. App. 343; Reed v. Reed, 9 Cal. App. 748.)"

And, also, bearing upon this point, we call the attention of the court to the case of Claudius v. Melvin, 146 Cal. 257, quoted in Reed, v. Reed (supra).

No case can be found where the final decree contains broader provisions than the interlocutory decree, which fixes the rights of the parties. The award of alimony in the case at bar is not based in any manner upon the agreement. The agreement is left unaffected by any action of the court, and indeed, a void agreement cannot be validated by any reference of the court in a final decree. The final decree does no more than make complete and final the interlocutory decree, and leaves the validity of the agreement and its provisions wholly undetermined.

If the reference to the agreement in the final decree is of any effect at all, then it clearly follows that the jurisdiction to determine the rights of the parties hereto would vest in the Superior Court and not in the federal court; such right having been expressly reserved; for the final decree says:

> " * * * by consent of the parties hereto the court hereby reserves the right to hereafter determine all matters in regard to the existing rights of the parties hereto".

It will be noticed, however, that the interlocutory decree, which alone can fix the question of alimony, contains no mention of any agreement, the final decree, as shown, does not establish property rights, and the mere incidental reference to an agreement does not alter or modify the interlocutory decree;

neither does it vitalize the agreement, but expressly declines to affect it.

We again wish to call the attention of the court to the fact that this agreement was made *in advance* of the commencement of the divorce proceedings.

In Palmer v. Palmer, 61 L. R. A. 647, the Supreme Court of Utah passed upon an agreement which recited: "Whereas, a divorce proceeding is in contemplation and will be instituted, * * * and said Palmer is willing to make a satisfactory settlement in lieu of all claims for alimony"; and it held:

> "The agreement, therefore, being one calculated or intended to facilitate the securing of a divorce is contrary to public policy."

Inasmuch as all of the promises of one party to the agreement were consideration for all of the promises of the other, and the agreement was based upon the procurement of a divorce, the illegal part of it is not separable, and the whole of it is void.

Dated, San Francisco,
May 8, 1922.

Respectfully submitted,
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